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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BELLAIRE TOWER HOMEOWNERS
ASSOCIATION,

Plaintiff, Cross-defendant and
Respondent,

v.

GOLDEN STATE BROADCASTING,
LLC,

Defendant, Cross-complainant and
Appellant.

A143119

(San Francisco City & County
Super. Ct. No. CGC-12-526191)

Golden State Broadcasting, LLC (Golden State) appeals from a judgment entered in favor of respondent Bellaire Tower Homeowners Association (Bellaire) for unpaid invoices for electrical utilities. Golden State contends the trial court erred by (1) precluding Golden State's principal and an expert witness from testifying at trial, as sanctions for Golden State's discovery abuses; and (2) not properly applying Public Utilities Code section 739.5. We will affirm the judgment.

I. FACTS AND PROCEDURAL HISTORY

A. Bellaire's Complaint

In November 2012, Bellaire filed a lawsuit against Golden State for unpaid utility bills. The complaint alleged that, in September 2009, Bellaire and Golden State entered into a written agreement by which Bellaire granted Golden State a nonexclusive license to operate an FM broadcasting transmitter and antenna on the Bellaire Tower in San

Francisco. Bellaire billed Golden State for its monthly electricity usage pursuant to the terms of the agreement; at some point, Golden State stopped paying.

Golden State answered the complaint and filed a cross-complaint against Bellaire, seeking damages for alleged overcharges and other matters. Bellaire filed an answer to the cross-complaint.

The court tentatively scheduled the trial for August 12, 2013. After an objection, the court set the initial trial date for January 13, 2014; accordingly, the discovery cutoff was December 14, 2013, and the deadline for hearing discovery motions was December 30, 2013. (Code Civ. Proc., §§ 2024.020, subd. (a), 2016.060.)

B. Discovery

1. Bellaire's Written Discovery Requests and Motion to Compel

On September 30, 2013, Bellaire served Golden State with written discovery requests including a request for production of documents, requests for admission, and form interrogatories. Two days before the discovery responses were due, Golden State's counsel requested a 20-day extension to respond. Bellaire's attorney agreed to a one-week extension.

On November 11, 2013, Golden State served discovery responses that were not verified, contained numerous objections, and failed to identify facts, documents, or witnesses supporting its cross-complaint. It neither produced documents nor specified when responsive documents would be produced.

Bellaire's counsel (Russell Leibson) asked Golden State's counsel (William Gwire) where the documents were. Gwire replied that he could not produce any documents "until I return to the Bay Area and am able to confer with my client which will be the end of the month, perhaps the beginning of December," even though the discovery cutoff was December 14, 2013, and trial was set for January 13, 2014.

On November 12, 2013, Bellaire's counsel e-mailed a meet and confer letter to Golden State's counsel, requesting that proper discovery responses be provided and documents produced by November 18, 2013, along with a privilege log of withheld documents. Golden State's counsel did not respond.

On November 20, 2013, Bellaire filed a motion to compel further responses to its written discovery. Golden State opposed the motion, providing a declaration in which counsel stated it had been difficult for him to provide timely discovery responses because he had undergone hip surgery in October 2013 and Golden State's principal contact, Edward Stolz, was very busy.

2. Bellaire's Notice of Stolz's Deposition and Motion to Compel

On November 25, 2013, Bellaire served a notice of the depositions of Stolz and Golden State's person(s) most knowledgeable on a variety of subjects, including the damages Golden State claimed in its cross-complaint. The notice scheduled the depositions for December 5, 2013. Golden State did not serve any objection to the notice.

On December 3, 2013, Bellaire's counsel sent an e-mail to Golden State's counsel, asking whether Golden State intended to produce witnesses or documents at the depositions on December 5, 2013, and offering to move the depositions to another date before the discovery cutoff. He also asked when Golden State would provide documents and further written responses to Bellaire's discovery requests.

That same day, Golden State's counsel responded that he did not know Stolz's availability, indicated he would not produce Stolz (or any other witness) for the scheduled depositions or provide any alternative dates for those depositions, and claimed he was unsure when he would provide the other discovery.

On December 4, 2013, Bellaire filed a motion for an order compelling the depositions of Stolz and the persons most knowledgeable at Golden State (or, alternatively, striking Golden State's cross-complaint) and imposing sanctions. Golden State did not oppose the motion, which was set for December 27, 2013.

3. Bellaire's Attempt to Depose Golden State's Expert Witness Frederick

Meanwhile, Golden State had served its "Expert Witness Designation, Disclosure, and Declaration", identifying Jesse Frederick as its retained expert witness. On December 3, 2013, Bellaire's counsel sent an e-mail to Golden State's counsel, asking for dates when he and Frederick would be available for Frederick's deposition before the

expert discovery cutoff. That same day, Golden State's counsel replied, "I will check with Frederick and let you know his availability."

Having not received any definite date for Frederick's deposition by December 6, 2013, Bellaire noticed the deposition of Frederick for December 23, 2013, warning that Bellaire would seek an order excluding his testimony if he did not appear. Golden State did not object to the notice.

On December 19, 2013, Bellaire's attorney e-mailed Golden State's attorney, inquiring whether Frederick would be produced for the deposition as noticed. Golden State's attorney replied: "We are not appearing. I will leave it to Mr. Stolz or new counsel to decide what, if anything to do with the expert."¹

4. Order Granting Bellaire's Motion to Compel Written Discovery

On December 20, 2013, the court granted Bellaire's motion to compel the written discovery requests and production of documents. The order directed that "[a]ll further responses and documents" be delivered to Bellaire's counsel by January 6, 2014; if the trial date were continued, the responses and documents would be due on January 22, 2014.

5. Order Compelling Depositions of Stolz and Golden State

On December 27, 2013, the court heard Bellaire's motion to compel the depositions of Stolz and Golden State's person(s) most knowledgeable. Although Golden State had not filed an opposition to the motion, it was represented by its attorney at the hearing.

The court granted the motion and ordered that the depositions of Stolz and Golden State's person(s) most knowledgeable, and the production of documents requested in the

¹On December 20, 2013, Golden State's counsel (Gwire) filed an ex parte application for an order shortening time for a hearing on a motion to withdraw as counsel of record, based on purportedly irreconcilable conflicts between counsel and Golden State. The court denied the application, and it does not appear any actual motion to withdraw was filed until January 14, 2014. (See *post*.)

deposition notice, occur by January 7, 2014. The court extended the discovery cutoff date to January 7, 2014, for this purpose.

6. Bellaire's Motion in Limine to Exclude Expert Frederick's Testimony

With the date for Frederick's deposition having come and gone, Bellaire filed a motion in limine on January 2, 2014, seeking to exclude testimony from Golden State's expert witnesses—particularly, Frederick. In support of the motion, Bellaire's counsel submitted a declaration attesting to his unsuccessful efforts to obtain dates for Frederick's deposition, the service of the deposition notice, the absence of any objection to the notice, and the e-mail from Golden State's attorney confirming that Frederick was not being produced despite the notice.

7. Golden State's Motion to Continue the Trial Date

On January 7, 2014, Golden State filed a motion to continue the trial, which was at the time still scheduled for January 13, 2014. Golden State based its motion in part on a declaration from Stolz, who averred (1) he needed a continuance to obtain new counsel; and (2) he was unavailable to appear for his deposition (which the court had ordered on December 27, 2013, to occur by January 7, 2014) or the mandatory settlement conference (which the court had set on December 17, 2013, to occur on January 10, 2014), because he was too busy moving Golden State's equipment from Bellaire Tower to another location.

The court set the continuance motion to be heard on the January 13 trial date. Bellaire opposed the motion.

8. Mandatory Settlement Conference and Continuance of the Trial Date

On January 10, 2014, Bellaire attended the mandatory settlement conference (with counsel, a client representative, and its insurance representative). Golden State, however, did not send a representative. Nor had it responded to Bellaire's good faith settlement demand or made such a demand as to its cross-complaint. Golden State's counsel represented that Stolz had refused to attend the mandatory settlement conference or even participate by phone, and that Stolz had instructed counsel not to bother calling him during the conference because he was just too busy.

On January 13, 2014, the court granted Golden State's motion to continue the trial date and scheduled the trial for March 24, 2014.²

9. Bellaire's Motion for Evidentiary Sanctions

We now come to the motion at the heart of this appeal. On February 18, 2014, Bellaire filed a motion for evidentiary, issue, or terminating sanctions against Golden State based on Golden State's (1) failure to comply with the court order to produce further written responses and documents by January 6, 2014; (2) failure to comply with the court order to produce Stolz and persons most knowledgeable for deposition by January 7, 2014; (3) failure to pay court-ordered monetary sanctions of \$750; and (4) failure to attend and participate in the mandatory settlement conference. The motion also noted Golden State's refusal to produce Frederick for deposition, indicating that Bellaire had filed a motion in limine to exclude his testimony. The hearing was originally set for the new trial date of March 24, 2014, in the master calendar department (department 206). Bellaire filed an amended notice of motion on February 19, 2014, setting the matter for hearing in the court's law and motion and discovery department (department 302) on March 21, 2014, the Friday before the Monday trial date.

Golden State filed an opposition to the sanctions motion on March 11, 2014, through attorney Gwire as "Former Attorney[]" for Golden State, since the court had already granted his motion to withdraw as counsel. In a declaration dated March 12, 2014, Stolz again explained his failure to appear for his deposition and the mandatory settlement conference: but this time, he claimed that he missed his deposition because of a "miscommunication" with counsel and missed the settlement conference because he was never informed of the date; otherwise, he would have attended.

On March 18, 2014, Golden State filed a substitution of counsel reflecting representation by a new attorney.

²The next day, Gwire filed a motion to be relieved as Golden State's counsel. He filed another motion to withdraw on February 5, 2014 (because the prior motion papers had omitted a proposed order), setting the hearing for March 7, 2014. On that date, the motion was granted.

On March 21, 2014, the court heard Bellaire's motion for evidentiary sanctions. Golden State's new counsel appeared at the hearing and argued against the motion.

The court granted the motion. The court struck the opposition papers filed by Golden State's former counsel (Gwire) because he no longer represented Golden State. The court then found that, "even considering those papers," (1) Golden State "unreasonably failed to make discovery, violated the Court's December 27, 2013 Order by failing to produce its witnesses [Stolz and Golden State] for deposition pursuant to Bellaire's valid deposition notice and by failing to pay the monetary sanctions ordered by the Court"; (2) Stolz submitted contradictory testimony on the issue of his compliance with the court's order of December 27, 2013, and his failure to appear at the settlement conference (comparing paragraph 4 of Stolz's declaration of March 12, 2014, with paragraphs 3, 17–18 and 25 of his declaration of January 6, 2014); and (3) Golden State had "severely prejudiced Bellaire's ability to respond to the allegations in [Golden State's] Cross Complaint and to prepare for trial." The court therefore imposed evidentiary sanctions precluding Golden State from offering any testimony by Stolz or any expert "responsive to a prior deposition notice and/or any documents supporting its affirmative defenses not already produced."³

C. Trial

A bench trial took place from March 25, 2014, to March 27, 2014. Bellaire presented evidence of the billing formula, Pacific Gas & Electric Company (PG&E) invoices, and meter readings used to calculate the bills to Golden State, as well as the invoices that Golden State had not paid. It also asserted that it billed Golden State for its monthly electricity usage at the same PG&E tiered rates as were charged homeowners, pursuant to the usage reflected on the sub-meters, and in accordance with Public Utilities Code section 739.5. Stolz and Frederick did not testify.

³Because the court effectively precluded Frederick from testifying in this order, Bellaire's motion in limine to exclude expert witness testimony apparently became moot.

At the conclusion of the trial, the court ruled in favor of Bellaire and against Golden State. In its statement of decision filed on May 19, 2014, the court found, among other things, that Bellaire used the PG&E residential rate tiered formula to calculate the monthly charges, and Bellaire charged Golden State the same rate that it would have been charged if PG&E had billed it directly, in compliance with Public Utilities Code section 739.5.

On July 22, 2014, judgment was entered in favor of Bellaire, awarding damages of \$41,904.36 plus accrued interest, attorney fees, and costs, for a total judgment of \$221,132.88.

This appeal followed.

II. DISCUSSION

Golden State contends the court erred in precluding the testimony of Stolz and Frederick, and in applying Public Utilities Code section 739.5.

A. Preclusion of Stolz's and Frederick's Testimony

We review orders imposing discovery sanctions for an abuse of discretion. (See, e.g., *Sinaiko Healthcare Consulting, Inc. v. Pacific Healthcare Consultants* (2007) 148 Cal.App.4th 390, 401.) “A court’s decision to impose a particular sanction is ‘subject to reversal only for manifest abuse exceeding the bounds of reason’” (*Electronic Funds Solutions, LLC v. Murphy* (2005) 134 Cal.App.4th 1161, 1183.)

1. No Abuse of Discretion

The order precluding Stolz’s and Frederick’s testimony was based on the court’s findings that Golden State “unreasonably failed to” provide adequate discovery responses, violated the court’s December 2013 order by failing to produce Stolz and persons most knowledgeable for deposition pursuant to Bellaire’s deposition notice, and failed to pay court-ordered monetary sanctions. The court further found that Stolz had made contradictory representations in his declarations regarding his failure to appear for his deposition and the mandatory settlement conference, and that Golden State’s conduct “severely prejudiced Bellaire’s ability to respond to the allegations in [Golden State’s]

Cross Complaint and to prepare for trial.” As set forth *ante*, substantial evidence supports the court’s factual findings.⁴

Under these circumstances, precluding Stolz and Frederick from testifying did not exceed the bounds of reason. It would have been futile for the court merely to order Golden State to produce Stolz (or Frederick) for deposition, because trial was scheduled for the next court day, Golden State had a history of failing to produce deponents even when ordered to do so, and no request for a continuance of the trial or discovery deadline had been made. Since Golden State had precluded Bellaire from obtaining discovery from Stolz and Frederick, it was not unreasonable to preclude Golden State from calling Stolz and Frederick as witnesses at trial. Furthermore, although Golden State now attempts to explain why the absence of Stolz’s and Frederick’s testimony was prejudicial, it points to nothing in the record indicating that it made such a showing in opposition to the *sanctions* motion in the trial court, such as an offer of proof as to Stolz’s or Frederick’s expected testimony at trial, or a description of the harm to Golden State if the witnesses were precluded.

In short, the court did not abuse its discretion by precluding Stolz and Frederick from testifying. As discussed next, Golden State’s arguments to the contrary are unavailing.

⁴Golden State tries to explain away the discrepancy between Stolz’s representation when he was seeking a continuance of the trial date in January 2014 (claiming he was too busy to appear for his “court ordered deposition” “to be concluded by Jan. 7” and “a court ordered settlement conference on January 10, 2014”) and his representation when he was trying to avoid sanctions in March 2014 (claiming he missed his deposition due to a “miscommunication” with counsel and “was not informed” of the settlement conference date). Golden State suggests that Stolz might have been thinking the settlement conference would be rescheduled and did not intend to communicate that he was never told about it, but that he did not receive sufficient advance notice to readjust his schedule. Substantial evidence supports the court’s conclusion that the representations were contradictory.

2. The Court's Statutory Authority in Absence of a Motion to Reopen Discovery

Golden State contends the court lacked statutory authority to issue the evidentiary sanctions because the discovery cutoff had passed, the motion was not heard at least 15 days before the initial trial date, and Bellaire had not filed a motion to reopen discovery. We disagree.

Golden State bases its argument on Code of Civil Procedure section 2024.020, subdivision (a),⁵ which states: “Except as otherwise provided in this chapter, any party shall be entitled as a matter of right to complete discovery proceedings on or before the 30th day, *and to have motions concerning discovery heard on or before the 15th day, before the date initially set for the trial of the action.*” (Italics added.)

This statute, however, does not mean a court *cannot* hear a discovery motion less than 15 days before trial, or even the day before a continued trial date; it merely means a party has no *right* to a hearing at that point. The court still retains discretion to hear and decide the matter. (See *Pelton-Shepherd Industries, Inc. v. Delta Packaging Products, Inc.* (2008) 165 Cal.App.4th 1568, 1586 (*Pelton-Shepherd*)). Golden State does not show that the court abused its discretion in deciding to hear Bellaire's motion.

Golden State nevertheless urges, in reliance on *Pelton-Shepherd*, that the court had no authority to issue the evidentiary sanctions order because Bellaire had not first successfully moved to reopen discovery. Golden State misreads *Pelton-Shepherd*.

In *Pelton-Shepherd*, the plaintiff had served the defendant with a demand for production of documents, to which a written response was due after the discovery cutoff. (*Pelton-Shepherd, supra*, 165 Cal.App.4th at pp. 1572–1573.) When the defendant did not respond by the deadline, the plaintiff filed a motion to compel the response, to be heard on a date after the last day a discovery motion could be heard. (*Id.* at pp. 1575, 1585.) The trial court granted the motion to compel. On appeal, the appellate court determined that, although the trial court had discretion under section 2024.020 to hear the motion to compel after the 15th day before the initial trial date, its discretion was limited

⁵Undesignated statutory references are to the Code of Civil Procedure.

by section 2024.050, which provides that a party may seek leave to have a discovery motion heard closer to the initial trial date, or to reopen discovery after a new trial date has been set, in accord with the factors set forth in that section. (*Pelton-Shepherd*, at pp. 1586–1587.) Because the plaintiff had not made a motion to reopen discovery—and there was nothing in the record to show that the trial court had decided that discovery should be reopened based on the relevant circumstances—the court exceeded its discretion to hear the motion to compel. (*Id.* at p. 1588.)

Pelton-Shepherd is distinguishable from the matter at hand. There, the moving party was seeking to *compel additional discovery* after the discovery cutoff and less than 15 days before trial. Here, Bellaire was not seeking to compel discovery, but to obtain *evidentiary sanctions* for Golden State’s refusal to provide discovery, its disobedience of prior court orders, and its refusal to participate in the mandatory settlement conference. We see no need to require a movant to ask that discovery be reopened (one court day before trial) when it only seeks sanctions for its opponent’s refusal to comply with prior court orders. Furthermore, Bellaire’s motion for evidentiary sanctions implicitly requested leave to have its motion heard later than 15 days before the trial date, and the trial court implicitly granted such leave by ruling on the motion. Golden State does not establish that the court should not have done so, or point to any time when it argued that the evidentiary sanctions motion should not be heard.

Moreover, regardless of whether the court had authority under the discovery statutes to preclude Stolz’s and Frederick’s testimony, the court had authority to do so under its inherent power to control the litigation and ensure a fair trial. (See *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1432–1434 [discussing cases in which nonmonetary sanctions, including terminating sanctions, could be imposed pursuant to the court’s inherent authority to control the proceedings, even in the absence of a prior motion to compel or prior violation of a court order]; *Cottini v. Enloe Medical Center* (2014) 226 Cal.App.4th 401, 425 (*Cottini*) [recognizing the trial court’s inherent power to preclude plaintiff’s expert from testifying at trial, as a remedy for his

unreasonable failure to comply with the expert witness exchange requirements before the cutoff date for expert witness discovery].)

The exclusion of Stolz and Frederick was a proper exercise of the court's inherent powers, in light of its findings that Golden State had failed to comply with prior court orders, provide discovery, and participate in the mandatory settlement conference, and its finding that Golden State had severely prejudiced Bellaire's ability to prepare for trial and respond to the allegations in Golden State's cross-complaint.

Golden State fails to establish that the court lacked authority to preclude Stolz and Frederick from testifying.⁶

3. Absence of a Prior Order Compelling Frederick's Deposition

Golden State argues that the court should not have precluded Frederick from testifying because it had not issued a prior order compelling his deposition. Golden State relies on section 2025.450, subdivision (h), which provides that, if a party-affiliated deponent "fails to obey an order compelling attendance" at a deposition, the court "may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction . . . against the party with whom that party deponent is affiliated."

Golden State is incorrect. While section 2025.450 *authorizes* the court to issue an evidentiary sanction against a party whose deponent violated an order to attend a deposition, it does not *preclude* the court from issuing an evidentiary sanction under other authority.

Section 2034.300, subdivision (d) provides for mandatory exclusion of the opinion of an expert witness who has not been provided for deposition, upon objection of a party who has fully and timely complied with its own obligations to exchange expert witness information under section 2034.260. No prior order compelling the deposition of the

⁶As alternative grounds for upholding the trial court's ruling, Bellaire argues that Golden State waived any claim that the court lacked statutory authority to impose the sanctions by not raising the issue in the trial court, and that Golden State is equitably estopped from contesting the order. We need not and do not decide these issues.

expert is necessary. (*Cottini, supra*, 226 Cal.App.4th at p. 425 [precluding plaintiff's expert from testifying due to his unreasonable failure to comply with expert witness exchange requirements, even without a prior motion to compel the deposition].)

Golden State argues that Bellaire was not entitled to relief under section 2034.300, because Bellaire failed to provide its expert witness information as required by section 2034.260. Golden State further argues that preclusion of an expert witness opinion under section 2034.300 is accomplished by a motion in limine, not in the discovery department.⁷

But even if Bellaire was not entitled to the preclusion of Frederick's testimony under section 2034.300, the trial court was empowered to preclude Frederick from testifying pursuant to its inherent authority to control the litigation and ensure a fair trial. (*Cottini, supra*, 226 Cal.App.4th at p. 425 [where exclusion of expert witness testimony is not mandatory under § 2034.300 due to movant's failure to comply with its disclosure obligations, court still has discretion to exclude the testimony under its inherent powers to curb abuses and promote fair process].) Golden State fails to demonstrate error.

4. Bellaire as a Discovery Cross-defendant, But a Moving Plaintiff

Golden State next contends the court should not have imposed evidentiary sanctions because Bellaire brought its motion for those sanctions as a "plaintiff," while

⁷The exclusion of expert witness testimony under section 2034.300 may be pursued by a motion in limine. (See *Cottini, supra*, 226 Cal.App.4th at pp. 425–426.) Bellaire made this motion in limine, but because the court excluded Frederick's testimony as an evidentiary sanction on March 21, 2014, the motion in limine became moot. Golden State argues that, if Bellaire's motion had been heard by the trial judge as a motion in limine, Golden State's newly retained counsel would have had the opportunity to submit written opposition papers. (See Super. Ct. City & County of San Francisco, Uniform Local Rules, rule 6.1.) But Golden State does not show that this written opposition would have been any more meritorious than what prior counsel had submitted; although the court struck prior counsel's written opposition, it concluded that the evidentiary sanctions would be appropriate "even considering those papers." Nor does Golden State establish that new counsel's opposition would have been any more persuasive than what new counsel told the court orally at the hearing, or provide any other reason Golden State would have received a better result if the issue of Frederick's testimony had been decided by the trial judge as a motion in limine.

Bellaire had served its notice of Stolz's deposition, and filed its prior motions to compel discovery, as a "cross-defendant." Golden State points us to subdivisions (a) and (g) of section 2025.450, which provide that "the *party* giving the notice" of a deposition may move for an order compelling the deponent's attendance and, if the motion is granted, the court shall impose a monetary sanction "in favor of the *party* who noticed the deposition." (Italics added.)

The argument is meritless. First, Golden State has not shown that it made this argument in the trial court. Second, Golden State is simply incorrect. The "party" who noticed the deposition of Stolz and Frederick, for purposes of section 2025.450, was Bellaire. The fact that the deposition notice and captions of prior motions to compel bore the name of Bellaire as a cross-defendant, and the evidentiary sanctions motion was brought in the name of Bellaire as "Plaintiff *and Cross-Defendant*," is immaterial. (Italics added.) Golden State provides no legal authority to the contrary.

5. Willfulness of Stolz's Failure to Appear

Golden State additionally argues that Stolz's failure to appear for his deposition was not willful, in light of Stolz's assertion in his declaration that he had to attend to the relocation of Golden State's equipment. (Citing *Biles v. Exxon Mobil Corp.* (2004) 124 Cal.App.4th 1315, 1326–1327 [generally, the prerequisite to the imposition of nonmonetary sanctions are a failure to comply with a court order, and the failure was willful].)

The argument is unpersuasive. In the first place, willfulness is no longer a prerequisite for the imposition of discovery sanctions. (See e.g., *Reedy v. Bussell* (2007) 148 Cal.App.4th 1272, 1291.) Moreover, there was ample evidence to suggest that Stolz's refusal to attend his deposition (or, looking at it another way, Golden State's refusal to produce him for deposition) was indeed willful. Among other things, Stolz gave conflicting reasons as to why he did not appear for his deposition. In opposition to the sanctions motion, he claimed he missed the deposition because of a miscommunication with counsel, but previously he had averred that he was just too busy to be deposed. It would not be unreasonable for the trial court to accept the "too busy"

representation—made earlier and before the motion for sanctions was filed—which indicates Stolz and Golden State made a conscious and willful choice to eschew the court-ordered deposition in favor of business that Stolz felt was more important.

6. Blaming Others

Golden State claims to be the “victim” of its former attorney’s health issues and the breakdown of their attorney-client relationship beginning around December 2013. It further claims that Bellaire “took advantage” of this breakdown and timed its motion for sanctions so that Golden State’s opposition would be due when Golden State was not represented. (On the other hand, one might think that the pendency of the sanctions motion would have encouraged Golden State to obtain new counsel *before* its opposition was due.) But the bottom line is that Bellaire was never given the discovery to which it was entitled, even as late as the court day before trial; without Bellaire having the opportunity to depose Stolz and Frederick, or any other Golden State person most knowledgeable with respect to the damages alleged in Golden State’s cross-complaint, it was not an abuse of discretion to preclude Stolz and Frederick from testifying, particularly in the absence of any request for a continuance of discovery or the trial.

In the final analysis, Golden State has failed to demonstrate error in the court’s order precluding Stolz and Frederick from testifying at trial.

B. Application of Public Utilities Code Section 739.5

Throughout the litigation, Golden State alleged that Bellaire had charged it for electricity at an excessive rate. Golden State contends the judgment should be reversed because the court improperly applied Public Utilities Code section 739.5 in this regard.

Public Utilities Code section 739.5 (hereafter Section 739.5) regulates utility costs paid by submetered tenants. Section 739.5 states in pertinent part: “The commission shall require that, whenever gas or electric service, or both, is provided by a master-meter customer [Bellaire] to users who are tenants of a mobilehome park, apartment building, or similar residential complex, the master-meter customer [Bellaire] shall charge each user [Golden State] of the service *at the same rate that would be applicable if the user*

were receiving gas or electricity, or both, directly from the gas or electrical corporation [PG&E].” (Italics added.)

The trial court concluded that the approach taken by Bellaire and its interpretation of Section 739.5 were permissible, based on its findings of fact. (Citing *Hillsboro Props. v. Pub. Utils. Com.* (2003) 108 Cal.App.4th 246.) Substantial evidence supports the court’s findings. Bellaire charged Golden State for its share of power usage based on the same tiered method used by PG&E for residential customers, as mandated by Section 739.5. Under PG&E’s tiered method, users of more electricity are billed at higher rates, and the tier 1 allowance is the baseline amount multiplied by the number of units. Golden State has its own sub-meter and was treated as one of the 65 units in the Bellaire Tower building. Bills were calculated using a software program with the PG&E tiered rates built into the program, as is standard in the industry. And, when the billing methodology was explained to Golden State’s attorney in May 2011, Golden State did not object to the methodology or offer an alternative. Furthermore, Golden State offered no evidence at trial that it could not have contracted directly with PG&E or that, if it had done so, it would have been charged a different amount than what Bellaire charged. Nor did it raise any issues with respect to the billing methodology or propose an alternative calculation.

1. Higher Rate Due to Pass Throughs

Golden State claims the trial court decided that Bellaire was allowed to charge for electricity at a rate higher than what Golden State would have been charged by PG&E directly, by permitting Bellaire to pass along certain additional costs (including costs in reading meters and measuring the use of the power). Golden State urges that this contravenes Section 739.5, which mandates that all users be charged at the same rate PG&E would have charged.

Golden State fails to establish error. In the first place, it fails to cite to any such finding of fact in the court’s statement of decision. Instead, it cites to a comment the court made orally at trial. This is insufficient to overturn the judgment. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268 [statement of decision provides the trial

court's reasoning and the basis for appellate review; even where there is no statement of decision, a court's oral comments may not be used to impeach the judgment on appeal, because "a trial court retains inherent authority to change its decision, its findings of fact, or its conclusions of law at any time before entry of judgment and then the judgment supersedes any memorandum or tentative decision or any oral comments from the bench"].) In addition, Golden State provides no legal authority or persuasive argument to support its position.

2. Differential Rates

Golden State claims the court found that Section 739.5 does not allow for differential rates among the sub-meter customers, and also found that PG&E provides for various pricing levels among its customers. Golden State contends these findings "appear[] to be in direct conflict" with Section 739.5.

Again, however, Golden State does not cite to the court's statement of decision, but to a comment the court made at trial. Moreover, it fails to explain why such findings would be inconsistent (with each other or with Section 739.5) under prevailing law and with respect to the particular facts of this case, or how Golden State was prejudiced.

Golden State fails to establish error.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.

(A143119)